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JOHN F. DAVIS,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. [redacted]254

JOHN E. ACUFF,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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OCTOBER TERM, 1968

NO. .....

JOHN E. ACUFF,
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v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered in this case on April 21, 1969.

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court of Appeals is unreported and is printed in Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on April 21, 1969, Mr. Justice Stewart, by order dated May 5, 1969, granted a petition to extend the time for filing the Writ of Certiorari to June 20, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Was it error to permit the jury to separate over the week-end after it had commenced its deliberation. The defendant objected to this separation. This was a rather highly publicized case. In affirming the conviction of the defendant, the Court of Appeals rendered a decision in conflict with the decision of another Court of Appeals on the same matter. The Seventh Circuit in *United States v. Panczke*, 353 F. 2d 676; and *United States v. D'Antonio*, 342 F. 2d 667, holds to the contrary.

2. Was it error to admit testimony by prosecution witnesses testifying on rebuttal to impeach defendant of other violations on the part of the defendant which have not resulted in conviction of a crime.

STATEMENT OF CASE

The defendant, John E. Acuff, operated a garage in Jasper, Tennessee. He was indicted by the Grand Jury on the charge that beginning on or about July 28, 1967, and continuing to and including October 31, 1967, he conspired with Charles Edward Pruett, a co-defendant, to sell, transfer and deliver counterfeit money in violation of Section 473, Title 18, U.S.C.

The Government based its case entirely upon the testimony of an undercover agent named Special Agent C. V.

Lyda, who had assumed the name of Jim Wood during the time charged in the indictment. Mr. Lyda testified that on the late evening of July 28, 1967, he went to the garage of John E. Acuff in Jasper, Tennessee, and introduced himself as Jim Wood along with another man named William Turner. That Turner began the conversation with Acuff concerning setting up an illicit distillery on some rural property owned by Mr. Acuff near Jasper, Tennessee. That during the conversation Mr. Acuff asked one of the individuals present if he had heard anything about counterfeit money. This individual said that he had not and Mr. Acuff then told him that the printing plant used to manufacture money used to be in his garage but was now at another location and that he had a large amount of counterfeit money buried near Jasper but someone stole it. Mr. Lyda, acting as Jim Wood, told Mr. Acuff that he got around a lot and would be interested in some counterfeit money, whereupon they stepped aside and had further conversation about counterfeit money. They separated by Mr. Acuff promising to secure some samples of counterfeit notes for Mr. Lyda to examine and that Lyda should return in a couple of days to see these samples.

Mr. Lyda testified that he returned on Sunday, July 30, 1967, and that Mr. Acuff told him that he had not had an opportunity to secure any samples at that time and that he had been working all night and for him to come back. Lyda said that he returned on Tuesday, August 1, 1967, and Mr. Acuff said that he had still not had an opportunity to secure samples and that he should return on the following day, which was Wednesday, August 2, 1967. That he returned the following day, on Wednesday, August 2, 1967, but did not get to talk with Mr. Acuff although he saw him in the garage.

Mr. Lyda testified that he next returned to Mr. Acuff's garage on Monday, August 7, 1967, and had a conversation with Mr. Acuff during which Acuff said that he had $15,000.00 counterfeit money in his possession at that time but showed no willingness to sell any of it and he said that his source of counterfeit notes was in Alabama and inquired of Mr. Lyda how he could be contacted at a truck stop which Mr. Lyda was supposed to own in North Carolina. Mr. Acuff said that he would have his Alabama supplier contact Mr. Lyda through the Sky City Truck Stop.

Mr. Lyda testified that he returned on Wednesday, August 9, 1967, accompanied by a young lady by the name of "Margie" whom he had picked up at a Chattanooga motel. He said that during this conversation Mr. Acuff produced a small piece of paper about four inches by three inches on which he observed the name "Eddie" written on the paper and that Acuff said that this person on the paper, "Eddie" was in Georgia and that he would have Eddie get in touch with Mr. Lyda, but Eddie never did make any contact with him.

That on Thursday, August 10, 1967, Mr. Lyda contacted Mr. Acuff again and was advised that he had still been unable to contact Eddie and to keep in touch with him. That on Friday, August 11, 1967, he called Acuff by telephone and was told that he had still been unable to get in touch with Eddie. That on Saturday, August 12, 1967, he went to the garage at Jasper and Acuff told him that he had still been unable to contact Eddie but he gave Lyda a piece of paper that he had seen on Wednesday and told him to call the number on that paper and have Eddie contact John Acuff. That upon receipt of this information, Mr. Lyda returned to his motel in Chattanooga and called the telephone number which was for a telephone listed in Trenton, Georgia, and after several attempts to reach Eddie he left

a message and Eddie returned the call. The message he left was for Eddie to contact John Acuff at the Holiday Inn in downtown Chattanooga. An appointment was made for a meeting with Mr. Lyda and Pruett to be held at the Holiday Inn on Sunday morning, August 13, 1967, and that Eddie did keep the appointment on Sunday morning and later they made another appointment for a meeting the same afternoon. During that meeting and a telephone conversation the following morning, Lyda and Pruett made arrangements for Lyda to go to Asheville, North Carolina, and that they would meet at the Sky City Truck Stop for the delivery of counterfeit money. Lyda went to Asheville, North Carolina, on August 14, but received no contact on the 14th, 15th and on the 16th received a call from "Eddie" Pruett stating that he was on the way, and that Pruett finally arrived in Asheville, North Carolina, on Thursday, August 17, 1967, where they met at the Sky City Truck Stop and later went to the motel room of Mr. Lyda at the Cavelier Motel where counterfeit money was delivered and Mr. Pruett and an associate, named Mays, were arrested.

Mr. Acuff's testimony was to the effect that his conversation with Turner and Lyda was at all times concerning the establishment of a moonshine distillery on the part of Turner and Lyda. That he told him that he had more business than he could take care of and that he was not interested in operating such a business. That Mr. Lyda returned to his place of business two or three times after this but that he had no conversation with him about counterfeit currency. That when Mr. Lyda saw that he was not going to participate that he asked Acuff if he knew of someone that would help him manufacture whiskey and he remembered a man who came by his place of business on occasion that had been in the business and told Lyda about him and it was for this reason that Lyda returned to his

place of business wanting to know if Acuff had contacted "Eddie" or knew where he could be reached. Mr. Acuff testified that he had not had counterfeit currency in his possession or at the garage and based upon this denial, the Court admitted the rebuttal testimony of Donald Harris to the effect that he had been at the garage of John E. Acuff in June, 1967, and helped John Acuff count out counterfeit $20.00 bills, and the testimony of William Herman Newman that during the month of June, 1967, he was in the garage of John E. Acuff and saw him in the possession of counterfeit notes. The case was tried on Thursday and Friday, January 4 and 5, 1968. The jury was respited on Friday evening, until Monday morning after the deliberations had already begun and after long deliberation on Monday, returned with a verdict of guilty against the defendant, John E. Acuff and Charles Edward Pruett. When the case was handed to the jury about 7:00 p.m. on Friday night, Acuff's attorney made an announcement to the Court that an objection was made to the separation of the jury if they could not agree, stating specifically that this objection was because of the wide publicity given the case by the news media.

A motion for a new trial was made and overruled by the Trial Court and affirmed by the Court of Appeals.

SPECIFICATIONS OF ERRORS TO BE URGED

The Court of Appeals Erred:

(1) In holding that it was not error to permit the jury to separate over the week-end after it had commenced its deliberation over the objection of the defendant in a highly publicized case.

(2) In holding that it was not error to admit testimony by prosecution witnesses testifying on rebuttal to impeach

defendant, of other violations on the part of the defendant which have not resulted in conviction of a crime.

REASONS FOR GRANTING CERTIORARI

I.

Defendant insists that the Court erred in permitting the jury to separate over the week-end after it had commenced its deliberations, over the objection of the defendant in a highly publicized case.

To review some of the proof:

(1) The case was tried on Thursday and Friday, January 4 and 5, 1968, in a setting of front page headlines in both the morning and afternoon papers, wide publicity by television and constant news reports on the radio.

(2) On Friday, January 5, 1968, at 7:30 p.m. the jury retired to the jury room to deliberate the verdict. Defense counsel anticipated the possibility that the jury might not be able to agree and at that time indicated to the Court that the defendant would object to respiting the jury over night. Counsel at that time stated to the Court that the reason for objecting to the permitting of jurors to separate after beginning their deliberation was because of the wide notoriety of the case.

(3) At 11:00 o'clock p.m. Friday, January 5, 1968, the Court permitted the jurors to separate after beginning their deliberations and go home for the week-end to return at 9:00 o'clock a.m. Monday morning. Again, the defendants excepted to the action of the Court in allowing the jurors to separate after beginning their deliberation and pointed out that because of the wide notoriety, that it would be impossible for the jury to not be contaminated in some way and especially from Friday night until Monday morning.

(4) The Court made no inquiry of the jurors upon their return the following Monday morning as to whether any of them had read newspaper articles which appeared, whether they had heard any broadcasts or whether any member of the family or otherwise had made any comment upon the case.

(5) After much further deliberation the jury found against the defendant.

As pointed out by Judge Weick, United States Court of Appeals, Sixth Circuit, in his opinion rendered in this cause, the various Courts of Appeals are in conflict on this matter. This opinion contains citations to all of the applicable Federal Court decisions and it seems that the majority view in Federal Court holds that a Trial Court has discretion in a non-capital case to decide whether juries should be allowed to separate during the course of its deliberation, however, this is not the generally prevailing majority opinion nor do all United States District Courts agree.

United States v. Panczko, 353 F.2d 676 (Seventh Circuit, 1965), and *United States v. D'Antonio*, 342 F.2d 667 (Seventh Circuit, 1965), hold that when on trial upon a charge of a commission of a felony, a defendant has the right to have his case decided by a jury whose secret deliberations are not interrupted by permitting them to separate before a verdict has been reached. Historically, this is a right recognized for many years.

Federal cases holding to the contrary are *Tyler v. United States*, 397 F.2d 565 (Fifth Circuit, 1968); *United States v. Breland*, 376 F.2d 721 (Second Circuit, 1967); *Hines v. United States*, 365 F.2d 649 (Tenth Circuit, 1966).

53 Am. Jur. Trial Section 872—sets forth the general rule. The general rule is not to permit jurors in felony

cases to separate after the case has been finally submitted to them. The author recites that under the rules prevailing in some jurisdiction, this right is so jealously guarded that even the defendant's consent cannot permit the jurors to separate in felony cases, however, in other jurisdictions, the defendant may waive his right to have the jury kept together after final submission of the case.

The latest annotation is 21 A.L.R. 2d at Page 1139— "The statute and rules are more strict and the Courts take a more serious view regarding separation after submission, because the chances of outside influence are more pronounced, for the evidence is all in and any extra legal information at that stage would tend to have a greater effect on the jurors' verdict, and, moreover, since the trial is nearing its end the danger of tampering with the jury is considerably enchanced."

In the case at bar, there was objection by defendant to the separation during deliveration and the separation was over the week-end for more than two days. In some of the cases holding that such separations are within the discretion of the Trial Court the objection was made by the defendant and the separation was merely overnight and the cases had little public attention, none of which were applicable in the case at bar.

This is what the Court said in *United States v. D'Antonio*, at Page 67 *supra*, 670.

> "At no time is it more essential that the jury should be immunized from outside influences than when it is engaged in deliberating upon what its verdict is to be. During that critical period, when the jurors are engaged in resolving vital issues between the government and the defendant, the Judge certainly should not relax the traditional safeguards against outside intrusion.

> Dispersement into the city at night of a group of men and women who have been deliberating in the security of the courthouse subjects them to the risk of being individually importuned, if not threatened, by telephone calls or personal contacts."

Between Friday night and Monday, the minds of the jury changed. The jury was unable to agree on Friday night and this change of opinion was caused by something. What caused the change? No member of the jury would admit that they had heard a news report, read a newspaper or received the comments of a neighbor.

Defendant in this case feels that certiorari should be granted and the general rule followed in Federal Courts which was the rule laid down by the Seventh Circuit in *United States v. Panczko* and *United States v. D'Antonio*, which is that it is error to permit the jury to separate after it has commenced its deliberations over the objection of the defendant in a highly publicized case.

II.

Upon cross-examination the defendant, John E. Acuff, had been asked the question whether or not he had ever at any time had counterfeit money at his garage. Acuff answered in the negative. Herman Newman and Don Harris were called as rebuttal witnesses and testified that they had seen counterfeit money during the month of June at Acuff's garage. Over objection these witnesses were also allowed to testify much more than a denial of Acuff's statement but testified in detail what happened at the garage and the circumstances surrounding the same.

While an accused, by taking the witness stand, waives his privilege against self-incrimination as to the particular crime for which he is on trial, this waiver does not extend

to questions as to collateral crimes asked solely for the purpose of affecting his credibility. The possession of counterfeit currency is a separate crime than that for which these defendants are being charged. The defendant, Acuff, had not been convicted of any previous crime. It must be kept in mind that Acuff is the defendant. If he were an ordinary witness it might be that he could be asked questions that are collateral and independent of the offense under investigation. It is competent for the purpose of discrediting a witness to show that he has been convicted of a crime. The general rule is that the crime must rise to the dignity of a felony or petit larceny. Whatever may be the limit in this respect, nothing short of a conviction of a crime is admissible for the purpose of impeachment. A mere accusation of indictment will not be admitted, for the reason that innocent men are often arrested and charged with a criminal offense. "*Lover v. United States*," (8 Cir.) 147 Fed. 426, citing 1 Greenleaf on Evidence, 16th Edition, Page 579-80. Any person's reputation for good character might be destroyed by such cross-examination.

The reason for the exclusion of this type of testimony is the danger of having a jury conclude from a collateral fact that the defendant must be guilty of the offense charged. This is especially true of the case at bar. We in the legal profession know that if the jury should believe the rebuttal witnesses, the testimony of these rebuttal witnesses would persuade them that the defendant was guilty of the substantive offense for which he was presently being tried.

Other acts of misconduct of the accused which have not resulted in conviction of a crime are not the proper subject of cross-examination to impeach the accused as a witness. See headnote 4 and 5, 26 A.L.R. 2, at Page 753. This case held that cross-examination of a defend-

ant which is unrelated to the offense charged is not permissible for the purpose of discrediting the accused.

The District Judge cited 29 Am. Jur. 2d, Section 327, as authority for the admission of the testimony of Newman and Harris, which section reads as follows:

> "Section 327—Attacking Credibility of Accused. Evidence as to independent and disconnected criminal acts may be received for the specific purpose of affecting the credibility of the accused if its effect upon credibility is not too remote, if its probative value is not outweighed by the risk that its admission will necessitate undue consumption of time or create a substantive danger of undue prejudice or of confusing the issues or of misleading the jury, and if it does not unfairly surprise the accused when he has not had a reasonable ground to anticipate that such evidence would be offered."

Defendant contends that no portion of this section is authority to support the admission of the testimony of Newman and Harris. The effect upon the credibility of the defendant by the receiving of this testimony is remote because the jury could not limit its mind to the fact that such testimony was only as to the credibility of the defendant. The Trial Judge allowed the examination of these witnesses to take a long period of time, allowed questions as to all of the details of the transaction and went far beyond the mere rebuttal of the testimony of the defendant, Acuff. The admission of this evidence confused the issues and misled the jury and the defendant had no knowledge whatsoever that these two men would be used as witnesses at the trial. They were complete surprises.

58 Am. Jur. Section 687—Cross-examination says:

"In some jurisdictions the accused may be interrogated as to specific acts; he may, it has been held, be asked as to acts connecting him with a nefarious occupation. He may be asked as to acts of misconduct reflecting upon his integrity or truthfulness, or under the rule in some jurisdictions, as to acts of misconduct or wrongdoing that may tend to degrade him, subject to the limitation that he may not be required to state facts constituting an independent crime. But when such question is asked and answered, the Government is bound by the answer in that it may not, on rebuttal, offer countervailing proof, *except when the question is as to conviction of a crime*. As in the case of other witnesses, it is error to permit the accused to be examined as to the distinct collateral matters with a view to impeaching him by other witnesses to contradict him."

Echert v. United States, *supra*, holds exactly in point that other acts of misconduct of the accused which have not resulted in conviction of a crime are not the proper subject for cross-examination to impeach the accused as a witness.

The answer of a witness on cross-examination as to a collateral matter is binding on the cross-examiner, and may not be contradicted.

There is a marked difference between cross-examination of an accused and that of an ordinary witness. Questions which tend to disgrace an ordinary witness and discredit his testimony can prejudice him in no other way. But where an accused takes the stand their inevitable effect is to create prejudice against him.

58 Am. Jur. Section 784, page 433.

It is well settled that it is not permissible for the government to show that a defendant has been accused, arrested for, or indicted for a crime. Only a previous conviction for a crime is admissible, under appropriate circumstances.

Manley v. United States, 238 F.2d 221, 222.

Bonniny v. United States, 130 F.2d 330, 338 cert. denied, 217 U.S. . . .

Acts of misconduct, not resulting in conviction of a crime are not the proper subject of cross-examination to impeach a witness.

Echert v. United States, *supra*; *Lennon v. United States*, 20 F.2d 490; *Little v. United States*, 93 F.2d 401; and *Simon v. United States*, 123 F.2d 80, cert. denied, 314 U.S. 694.

CONCLUSION

The defendant prays that he be granted a new trial.

Respectively submitted,

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Attorneys for Petitioner,

June 13, 1969

APPENDIX A

[1]

In The

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

No. 18,619

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN E. ACUFF,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Tennessee, Southern Division.

Decided April 21, 1969.

Before: WEICK, Chief Judge, and O'SULLIVAN and COMBS, Circuit Judges.

COMBS, Circuit Judge. These appeals are by co-defendants, John E. Acuff and Charles Edward Pruett, who were found guilty by a jury of conspiring to sell, transfer, or deliver counterfeit money in violation of 18 U.S.C. §§ 371 and 473. Acuff was sentenced to thirty months and Pruett to five years imprisonment.

The Government's proof consisted primarily of the testimony of C. V. Lyda, a special agent of the United States Secret Service, who had worked on the case. Lyda

[2] testified that he, accompanied by one William Turner, first met defendant Acuff on July 28, 1967, at Acuff's garage in Jasper, Tennessee. Lyda was introduced

to Acuff as Jim Wood, owner of a North Carolina truck-stop. At first, the discussion centered around setting up an illicit distillery, and then to the subject of counterfeiting. When Lyda expressed an interest in purchasing counterfeit notes, Acuff promised to procure some samples for his inspection. According to Lyda, Acuff told him that he obtained his notes cheaper by procuring buyers for his supplier. Lyda was again in touch with Acuff on July 30th and on August 1st and 2nd, but no samples were furnished.

On August 7th, Acuff assured Lyda that his source would contact him to set up a sale. When these assurances failed to materialize, Lyda again contacted Acuff on August 9th and Acuff produced a small piece of paper on which were written some numbers and the name "Eddie." Acuff told Lyda that Eddie was the person who was expected to contact him. Acuff then quoted him a price of twenty-five cents on the dollar or twenty cents if notes in excess of $20,000 were purchased.

On August 12th, following meetings with Acuff on August 10th and 11th, Lyda was given the piece of paper he had seen on August 9th. He was told to call Eddie at the number listed on the note and to leave a message for Eddie to call John Acuff at a room occupied by Lyda in a Chattanooga motel. As a result of the telephone calls, a meeting was arranged between Lyda and defendant Pruett for August 13th. On that date Lyda first came in contact with Pruett at the Chattanooga motel. After some preliminary discussion and a call to Acuff to double check Lyda's trustworthiness, Pruett offered to sell the notes to Lyda at the same price previously quoted by Acuff. By August 14th, definite arrangements had been made for Lyda to go to the North Carolina truckstop where the

transfer would take place. However, when Pruett made no delivery by August 16th, Lyda phoned Acuff who [3] assured him that the deal was still on. Lyda gave Acuff his telephone number at the motel where he was staying in North Carolina, and Pruett later called to confirm the sale. On August 17th, Pruett and an associate arrived at the appointed place in North Carolina. The counterfeit notes were produced, and Pruett and the accomplice were arrested. Acuff was arrested on September 1st. At that time he had in his possession counterfeit notes, as well as a notation of Pruett's name, address, and telephone number.

To controvert Agent Lyda's testimony, the defense produced only one witness — Acuff. Acuff admitted a series of meetings with Lyda, but he maintained that their discussions were directed only to manufacturing whiskey and not to the sale of counterfeit money. He testified that, after repeated inquiries, he told Lyda that he did "know of a fellow" who manufactured whiskey and that, if he saw the man, he would get his name and telephone number and relay it to Lyda; that, coincidentally, he did see Pruett and obtained the information which he supplied to Lyda.

Appellants first assert that their request for a continuance due to alleged prejudicial pre-trial publicity was erroneously denied. Specific reference is made to statements of an "Assistant Attorney General," relating to charges pending against Acuff, which were carried in a newspaper article circulated on the evening before and the morning of the first day of the trial.

The trial judge conducted a careful and exhaustive voir dire of prospective jurors. Those who gave any indication that they had knowledge of the case were excused.

Moreover, at the conclusion of the judge's examination, each side conducted its own voir dire, directed in part to the question of pre-trial publicity.

Nothing was developed on the voir dires which would have justified postponement of the trial. Appellants have neither demonstrated nor suggested that any member of the jury as finally constituted had gathered any knowl-
[4] edge of the case from news articles or otherwise. The district court properly denied the motion for continuance.

Appellants next complain that the trial court erred in admitting into evidence statements allegedly made by one defendant out of the presence of his co-defendant before the prosecution made a prima facie showing of conspiracy. Agent Lyda testified, over timely objections, to various out-of-court statements made to him by one of the defendants out of the other's presence. In each instance, the jury was instructed that the statements of one of the defendants could be considered against his co-defendant only if the jury found from other proof that a conspiracy existed. The proper admonition was also included in the court's final instructions.

It is a well-settled exception to the hearsay rule that declarations of a conspirator made in furtherance of the conspiracy are admissible against co-conspirators not present when the statements were made. However, since these declarations are admissible only on the assumption that a conspiracy exists, it naturally follows that there must be proof aliunde to connect an alleged conspirator to the conspiracy. *Glasser v. United States*, 315 U.S. 60 (1942); *Continental Baking Co. v. United States*, 281 F.2d 137 (6th Cir. 1960). It is within the trial judge's

discretion to admit declarations and acts of an alleged co-conspirator subject to later proof of the existence of the conspiracy. *Enriquez v. United States*, 314 F.2d 703 (9th Cir. 1963); *Rizzo v. United States*, 304 F.2d 810 (8th Cir. 1962); *United States v. Dennis*, 183 F.2d 201 (2nd Cir. 1950). See *United States v. Harris*, 391 F.2d 348 (6th Cir. 1968). See generally IV Wigmore on Evidence § 1079. In following this well-established procedure, the trial judge did not abuse his discretion under the circumstances present here.

In denying defendants' motions for a judgment of acquittal, the trial judge held, in effect, that a prima facie showing of conspiracy had been made as to each defendant, independently of the questioned declarations of the [5] alleged co-conspirators. Our review of the record convinces us that this conclusion was correct. See *United States v. Hoffa*, 349 F.2d 20, 41 (6th Cir. 1965), *aff'd*, 385 U.S. 293 (1966).

Appellants also assert as an evidentiary error the admission of certain rebuttal evidence, relying on the exclusionary rule prohibiting impeachment on collateral issues. On direct examination, Acuff expressly denied that he had "ever been in the counterfeiting business or connected with it." Then, on cross-examination in answer to specific questioning, Acuff denied that during June, 1967 he had shown Herman Newman counterfeit obligations or that he had permitted Donald Harris to help him count counterfeit notes. Newman and Harris were produced to rebut Acuff's denials. They testified that they had seen Acuff in possession of counterfeit notes. Appellants contend that possession of counterfeit notes prior to the time charged in the indictment was a collateral matter, and that admission of extrinsic evidence to impeach Acuff's denial of such possession was prejudicial error. We disagree.

When Acuff made the sweeping denial on direct examination that he had ever been connected with the counterfeiting business, he opened the door, solely for the purpose of attacking his credibility, on a subject on which the law otherwise would have shielded him. *Walder v. United States*, 347 U.S. 62 (1954); *Michelson v. United States*, 335 U.S. 469 (1948); *Ferrari v. United States*, 244 F.2d 132 (9th Cir. 1957), *cert. denied*, 355 U.S. 873 (1957). The jury was instructed that the rebuttal testimony was introduced solely for the purpose of attacking Acuff's credibility, and was not to be considered for any purpose against Pruett. We find no error here.

Appellants next complain that they were prejudiced by the separation of the jurors over the week-end after the case had been submitted to the jury. Deliberations began around 7:30 P.M. on Friday. Defendants' counsel stated that they would oppose separation of the jurors should that question arise due to the widespread publicity which [6] they alleged had already been given to the case. Around 11:00 P.M., at the jury's request, the judge dismissed them until Monday morning after giving the usual cautionary instructions.

The majority view in federal courts seems to be that the trial court has discretion in a non-capital case to decide whether the jury should be allowed to separate during the course of its deliberations. *Tyler v. United States*, 397 F.2d 565 (5th Cir. 1968); *United States v. Breland*, 376 F.2d 721 (2nd Cir. 1967); *Hines v. United States*, 365 F.2d 649 (10th Cir. 1966). See *Cardarella v. United States*, 375 F.2d 222 (8th Cir. 1967); *Lucas v. United States*, 275 F. 405 (8th Cir. 1921).[1] We note, however,

[1] Many of the states have dealt with this problem by statute. Although the rules prevailing in those states are many and varied, the general rule

(Continued on following page)

that in *United States v. Panczko*, 353 F. 2d 676 (7th Cir. 1965), and in *United States v. D'Antonio*, 342 F. 2d 667 (7th Cir. 1965), it was held that permitting the jury to separate after final submission of the case was error under the circumstances there existing.

We are of the opinion that a rule making sequestration mandatory during deliberations but discretionary during the course of the trial draws an unsound distinction. Those jurors who are susceptible are just as likely to be influenced when separated during the course of the trial as when separated while deliberating. *Tyler v. United States*, *supra*; *United States v. D'Antonio*, *supra*, (dissenting opinion). Whether sequestration is necessary should turn on the special facts of each case rather than on the stage of the trial process. Circumstances surrounding some criminal trials even in non-capital cases clearly demand sequestration. Certain cases by their nature create wide public interest and invite discussion. In such cases the likelihood that jurors might be subjected to outside influences is increased. Prejudicial publicity could be [7] the decisive factor in ordering sequestration in other cases. See *Sheppard v. Maxwell*, 384 U.S. 333 (1966). Another example is furnished by *United States v. Hoffa*, *supra*.

However, where there is no valid reason to believe that separation will deprive an accused of a fair trial, the totality of circumstances, including such factors as inconvenience to jurors, the possibility of hastened ver-

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seems to be that the trial court has discretion to permit the jury to separate during the trial of a non-capital case prior to final deliberations. However, in most states jurors may not separate in felony cases after a case has been finally submitted to them. In some jurisdictions where separation is allowed after submission, it may be permitted in both capital and non-capital cases. 53 Am. Jur. Trial § § 866-75; Annot., 21 A.L.R. 2d 1082 (1952).

dicts to avoid prolonged sequestration, lack of adequate lodging, and the extent of the publicity given to the case, may indicate that permitting separation will not prejudice the defendant and will serve the best interests of all concerned. The trial judge is in the best position to weigh these various factors and we are of the opinion that he should be given the discretion to make the determination. This discretion should be exercised with caution, of course, and any charge of outside influence should be given careful consideration.

The appellants here have failed to demonstrate the presence of an atmosphere so fraught with prejudicial publicity as to justify an inference that prejudice was probable without sequestration. There is no showing of widespread interest in the case and no attempt was made to show that any juror was subjected to outside influence. Prejudice should not be presumed where there is absolutely nothing in the record to justify such an inference. *Aiuppa v. United States*, 393 F.2d 597 (10th Cir. 1968). We find that the trial court properly exercised its discretion and we find no error in permitting the jury to separate under proper admonition.

Lastly, appellants contend there was not sufficient competent evidence to support the verdict. We cannot agree. The evidence is clearly sufficient to support the verdict.

Judgment affirmed.

CERTIFICATE OF SERVICE

I, STANLEY K. FORD, Owner and Manager of Tennessee Law Printers, 907 Market Street, Knoxville, Tennessee 37902, do hereby certify that I have this day made service upon the following of two copies of the within Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit by forwarding said copies thereto via United States Mail, postage prepaid:

Solicitor General,
Department of Justice,
Washington, D. C. 20530.
(VIA AIR MAIL)

Mr. Robert E. Simpson,
United States Attorney,
Eastern District of Tennessee,
359 Federal Building,
Chattanooga, Tennessee 37402.

This, the 14 day of June, 1969.

Stanley K. Ford

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No. 254

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In the Supreme Court of the United States

OCTOBER TERM, 1969

JOHN E. ACUFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

WILL WILSON,
Assistant Attorney General,

BEATRICE ROSENBERG,
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OPINION BELOW

The opinion of the court of appeals (Pet. App. 15-23) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1969. Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to June 20, 1969, and the petition was filed on June

18, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in permitting the jurors to separate after they had commenced their deliberation.

2. Whether it was proper to permit impeachment of petitioner's testimony upon direct examination that he had never been connected with counterfeiting.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner and co-defendant Pruett were convicted of conspiracy to sell, transfer and deliver counterfeit currency, in violation of 18 U.S.C. 371 and 473. Petitioner was sentenced to imprisonment for thirty months (R. 1, 19).[1] The court of appeals affirmed.

1. In July 1967, a Secret Service agent, pretending to be a dealer in "pep" pills, talked with petitioner in Jasper, Tennessee, about setting up an illicit still on petitioner's premises. Petitioner asked the agent whether he would be interested in buying counterfeit currency. The agent indicated that he would and petitioner named a price (Tr. 52-59).

[1] A second count against petitioner alone, charging possession of counterfeit currency, was severed by the court before trial (Tr. 340). Another co-defendant, Mayes, was not tried, having been taken into custody as a fugitive on a State charge (Tr. 95).

After several abortive meetings, petitioner said that his source, a person named "Eddie", could be contacted by calling a telephone number written on a yellow slip of paper, which he gave the agent (Tr. 60-75; Govt. Exh. 1). Calls to this number resulted finally in a return call by a person identifying himself as Eddie, who agreed to meet the agent. At this meeting, co-defendant Charles Edward Pruett appeared, said that he had been in touch with petitioner, and offered to sell counterfeit $10 and $20 bills at the price which petitioner had quoted (Tr. 75-80). Pruett and co-defendant Mayes later met with the Secret Service agent and a second agent. Pruett exhibited samples of the counterfeit currency which he was offering to sell (Tr. 84-92; 174-175). When he and co-defendant Mayes later made delivery, they were arrested and the counterfeit money seized (Tr. 95; 181-184).

Petitioner, testifying in his own behalf on direct examination, stated that he had never been connected with the counterfeiting business (Tr. 240). On cross-examination, he testified that Herman Newman was a friend but he had never shown Newman any counterfeit bills, and that he knew Donald Harris but that Harris had never helped him count counterfeit $20 bills. Over petitioner's objection, this questioning was permitted solely for its possible bearing on his credibility. (Tr. 265-269). On rebuttal, the government was permitted to introduce testimony, for the same limited purpose, by the two parties referred to previously. Harris stated that he had helped petitioner count $20,000 in counterfeit $20

bills and had received two of these bills, which were admitted in evidence (Tr. 274-282). Newman testified that he had seen several stacks of bills on petitioner's desk, covered by a piece of canvas. They were wrapped, but not in the manner bills were wrapped at the bank; a larger number of bills were enclosed by the wrappers, which were of a different color than those used at the bank. Petitioner gave him a bill, which was stiffer than an ordinary bill and which would "rattle" when it was bent (Tr. 287-291).

2. At the conclusion of the two-day trial, the court told the jurors that they ought to deliberate for a reasonable time that evening (Tr. 297). After charging the jury, the court said that it would let them determine how long they would deliberate that evening. One of the jurors asked if they might come back the following day, which was Saturday. The court said that would be desirable, but if it presented any problems to the jurors, they might have to wait until Monday. When the jury had retired, petitioner objected to an overnight respite, the stated reason being the notoriety of the case (Tr. 328-329). At 10:15 p.m., the jury said, in response to an inquiry by the court, that it wished to continue deliberating (Tr. 331-332). At 11:00 p.m., the jury requested a recess until Monday. The court ordered a recess until 9:00 o'clock on Monday morning. The jurors were told to bear in mind all of the court's instructions not to discuss the case, not to allow any one to talk with them and not to listen to or read news accounts about the case. Petitioner's attorney indicated that

he wished to take up something with the court, but said that he would wait until the jury was out. After the jury had left, objection was made for both defendants that, because of the notoriety of the case, it would be impossible for the jury not to be contaminated in some way by the separation, especially since it would run from Friday evening until Monday morning (Tr. 332-335). The jury reconvened at 9:00 a.m. on the following Monday and returned a verdict of guilty at 11:18 a.m. (Tr. 337-339).

ARGUMENT

1. It was not improper to comply with the wishes of the jurors to disperse over the weekend, even though they had commenced their deliberation. As his reason for claiming that this was prejudicial, petitioner says that there was extensive publicity about the case. Before dismissing the jury, however, the court gave an emphatic warning to the jury not to listen to or read anything about the case over the weekend. There is no claim that they disregarded this admonition, or that anyone contacted a juror personally. By contrast, in *Holt* v. *United States*, 218 U.S. 245, 250-251, it was conceded for the purpose of ruling on a defense motion that the jurors had read newspaper accounts of the pending trial. Nonetheless, this Court held, per Mr. Justice Holmes, that the mere opportunity for prejudice raised no presumption that it existed and that the circumstances there failed to show an abuse of the trial court's discretion.

Petitioner, relying on *United States* v. *Panczko*, 353 F.2d 676 (C.A. 7), and *United States* v. *D'Antonio*, 342 F.2d 667 (C.A. 7), urges that after a case has been submitted to the jury, separation should never be permitted. While broad language in this regard was used by the Seventh Circuit in these two cases, the particular facts in each would amply support the court's ruling in any event. The court in *D'Antonio* stressed the fact that the trial judge delegated his duty of cautioning the jury to a marshal, and the record did not even show whether he had executed his instructions. In *Panczko* the court was particularly concerned with the difficulties and hardships to which the jurors were subjected—reaching their homes by train and other means of transportation at a late hour of the night. Special conditions may exist which call for caution, and the Court of Appeals for the Seventh Circuit may feel that a rigid rule is beneficial in that circuit. Other circuits can properly leave more discretion to trial judges, and that is precisely what they have done. For example, in reviewing the two Seventh Circuit cases, the Court of Appeals for the Fifth Circuit was of opinion that no reason existed to fashion an inflexible rule or to freeze the somewhat divergent practices under different circumstances into a rigid uniformity. *Tyler* v. *United States*, 397 F.2d 565, 567, 569 (C.A. 5), certiorari denied, 394 U.S. 917. See also *United States* v. *Breland*, 376 F.2d 721, 723-724 (C.A. 2); *Cardarella* v. *United States*, 375 F.2d 222, 227-229 (C.A. 8), certiorari denied, 389 U.S. 882; *Grant* v.

United States, 368 F.2d 658 (C.A. 5); *Hines* v. *United States*, 365 F.2d 649 (C.A. 10); *Roth* v. *United States*, 339 F.2d 863, 866 (C.A. 10).

In the instant case, the convenience and wishes of the jurors provided the basis for the trial court's procedure. Full opportunity was offered them to give deliberate consideration to the case, free from the subtle coercion of being forced to stay together until they had reached a verdict. Nothing in the record gives substance to a belief that they disregarded the court's admonition or that they changed their minds in the interim during which they were separated. They returned Monday morning fresh and, without compulsion of any kind, reached agreement some two hours later. Neither the facts of the particular case nor the claimed superiority of a rigid rule governing all situations suggests the necessity, or indeed the desirability, of further review by this Court.

2. Petitioner's entire argument that evidence of other dealings in counterfeiting was erroneously admitted is based upon the false premise that it was admitted to contradict petitioner's testimony on cross-examination (Pet. 10). On the contrary, it was petitioner himself who opened the door to this evidence by his false testimony on direct examination that he was never connected with the counterfeiting business in any way (*supra*, p. 3). The testimony of Newman and Harris was thus properly admitted for the purpose of impeaching petitioner's credibility. *Mich-*

elson v. *United States*, 335 U.S. 469, 479; *Walder* v. *United States*, 347 U.S. 62.[2]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
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BEATRICE ROSENBERG,
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Attorneys.

JULY 1969.

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[2] In addition, since knowledge of the counterfeit character of the currency involved is an essential element of the crime charged (see *Rood* v. *United States*, 340 F.2d 506 (C.A. 8), certiorari denied, 381 U.S. 906; *Paz* v. *United States*, 387 F.2d 428 (C.A. 5)), evidence of petitioner's prior dealings in counterfeit money was admissible in order to prove such knowledge (see *United States* v. *Carlson*, 359 F.2d 592 (C.A. 3); *United States* v. *Kelley*, 186 F.2d 598 (C.A. 7), certiorari denied, 341 U.S. 954).

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